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Supreme Court, U.S.  
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**In the  
Supreme Court of the United States**

**October Term, 1988**

**WEST PENN POWER COMPANY, a corporation,**  
*Defendant-Petitioner,*

**v.**

**JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C.  
ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR,  
A Partnership and as Representative of a Class,**  
*Plaintiffs-Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI TO THE PENNSYLVANIA  
SUPERIOR COURT**

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**QUESTION PRESENTED FOR REVIEW**

Does Section 317 of the Federal Power Act, 16 U.S.C. §825p (1982), pre-empt state law claims for negligence and operation of a dangerous instrumentality asserted in state court against the private owner of a federally licensed hydroelectric power dam?

**LIST OF ALL PARTIES**

The parties in the Superior Court of Pennsylvania were:

John H. Engle, William R. Engle, William C. Engle, t/d/b/a Engle's Holiday Harbor, a Partnership and as Representative of a Class, Appellee; Plaintiffs in the Court of Common Pleas of Washington County, Pennsylvania

and

West Penn Power Company, Appellant; Defendant in the Court of Common Pleas of Washington County, Pennsylvania.

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**OPINIONS BELOW AND JURISDICTION**

Respondents are satisfied with Petitioner's presentation of the opinion below and grounds on which it seeks to invoke the jurisdiction of this Court.

**STATUTORY PROVISIONS INVOLVED**

Respondents are satisfied with Petitioner's statement of the statutory provisions involved.

## STATEMENT OF THE CASE

Respondents, John H. Engle, William R. Engle, and William C. Engle, t/d/b/a Engle's Holiday Harbor, filed a class action Complaint in November 1985 against West Penn Power Company in the Court of Common Pleas of Washington County, Pennsylvania. The Complaint alleged that Respondents (hereinafter "Plaintiffs") had suffered property damage in connection with the allegedly negligent release of waters from the Lake Lynn Dam, owned and operated by Petitioner West Penn Power Company (hereinafter "Defendant"). In addition to the negligence claim, the Complaint also alleged a claim for operation of a dangerous instrumentality. No federal claims were alleged in the Complaint.

Defendant West Penn Power Company removed this action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §1441 (1982 & Supp. 1986). Defendant argued that removal was proper because the federal court had "exclusive jurisdiction" pursuant to Sections 10(c) and 317 of the Federal Power Act, codified at 16 U.S.C. §803(c) (1982 & Supp. 1986) and §825p (1982), respectively.

The United States District Court for the Western District of Pennsylvania granted Plaintiffs' Motion to Remand, holding that Defendant's "exclusivity" argument was asserted as a defense and did not provide a basis for removal. *Engle v. West Penn Power Company*, No. 85-2924, mem. op. at 5 (W.D. Pa. March 13, 1986). The District Court held that Plaintiffs' Complaint stated prima facie claims arising under state law, which did not lose their validity because of the existence of the Federal Power Act, 16 U.S.C. §791(a), *et seq.* (1982). *Id.* at 6.

The District Court stated that, in remanding the case, it had made no determination on the merits of Defendant's contention that Plaintiffs' claims were within the exclusive jurisdiction of the federal courts and were, therefore, totally pre-empted by federal law. *Id.* at 7. The District Court noted, however, that "the Federal Power Act, unlike the Labor Management Relations Act, is not an area in which the extent of federal primacy is well established and in which it is clear that all state law has been displaced." *Id.* at 6 (citing *Cleveland Electric Illuminating Co. v. City of Cleveland*, 50 Ohio App. 2d 275, 363 N.E.2d 759 (1976); *Airco Alloys Division, Arco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D.2d 378, 411 N.Y.S.2d 460 (1978)).

On remand, Defendant filed Preliminary Objections in the Court of Common Pleas of Washington County raising the argument that the state courts of Pennsylvania lacked jurisdiction over Plaintiffs' state law claims because the federal courts had "exclusive jurisdiction" over Plaintiffs' state law claims.

The Court of Common Pleas of Washington County dismissed Defendant's Preliminary Objections, holding that Plaintiffs' state law negligence claims were not pre-empted by the Federal Power Act. *Engle v. West Penn Power Co.*, No. 271 Nov. Term 1985 A.D., slip op. (Court of Common Pleas of Washington County, Pa., August 4, 1986). The Superior Court affirmed.<sup>1</sup> The Supreme Court of Pennsylvania refused Defendant's Petition for Allowance of Appeal. *Engle v. West Penn Power Co.*, No. 450 W.D. Allocatur Docket 1987 (April 11, 1987). Defendant then filed a Petition for a Writ of Certiorari in this Court.

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<sup>1</sup>The Opinion of the Superior Court of Pennsylvania is reported at 366 Pa. Super. Ct. 104, 530 A.2d 913 (1987), and in the Appendix to Defendant's Petition at B-1.

## SUMMARY OF ARGUMENT

There are two grounds for denying the Petition for Writ of Certiorari.

First, there is no authority for the proposition advanced by West Penn Power Company that Section 317 of the Federal Power Act, 16 U.S.C. §825p (1982), pre-empts state common law actions for property damage caused by private owners of hydroelectric dams licensed by the Federal Energy Regulating Commission ("FERC") pursuant to the Federal Power Act. The legislative history of the Federal Power Act and decisions of this and other courts interpreting the Act are devoid of any such implication. The courts have consistently upheld the exercise of traditional police powers of the states against pre-emption challenges.

In construing the Federal Power Act, federal pre-emption of state law has been limited to two areas: 1) regulation of wholesale interstate rates for electricity; and 2) the licensing power of the Federal Energy Regulatory Commission. This case raises no issues which touch on, directly or indirectly, federally pre-empted areas. Because of this, no question of national significance is raised by the issues in this case.

Second, the language contained in 16 U.S.C. §825p (1982) providing for "exclusive jurisdiction" in the federal courts is limited to actions alleging violations of the Federal Power Act. This language does not divest the state courts of subject matter jurisdiction with respect to common law negligence actions or actions brought under other state theories.

## ARGUMENT

### I. THE FEDERAL POWER ACT DOES NOT PRE-EMPT STATE LAW CAUSES OF ACTION FOR PROPERTY DAMAGE

#### A. West Penn Power Company Has Conceded That The Federal Power Act Does Not Pre-empt State Law Causes Of Action

Defendant West Penn Power Company's position is confusing and internally contradictory. While apparently arguing for "exclusivity" or pre-emption, West Penn Power Company concedes that the Federal Power Act does not pre-empt state law tort actions. *See* Petition for Writ of Certiorari, §I.C. at 15 (hereinafter "Petition").<sup>2</sup> Despite West Penn Power Company's explicit admission that it is not advocating pre-emption of federal law, West Penn Power Company cites this Court to pre-emption cases. *See* *Petition*, at 15-17 ("Thus, although the petitioner *does not claim pre-emption here*, the following cases are cited merely to show *the possible negative effect* of state court involvement in the federal regulatory scheme.") (emphasis supplied). This internally inconsistent position makes Defendant's arguments difficult to comprehend and address.

Although West Penn Power Company's Petition concedes that the Federal Power Act does not pre-empt state law tort claims, Plaintiffs are obliged to address the other arguments raised by Defendant.

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<sup>2</sup>Plaintiffs here note the inclusion of Appendices G-J in Defendant's Appendix. The inclusion of these documents and the references to them in Defendant's Petition are improper because they were not a part of the record before the Superior Court.

### **B. Exclusivity And Pre-emption Are Not Interchangeable Concepts**

Defendant has mistakenly interchanged the concepts of pre-emption and exclusive jurisdiction. Exclusivity and pre-emption are distinct and different concepts. They are not interchangeable.

Federal pre-emption . . . should be distinguished from exclusive federal jurisdiction. As to the former, federal substantive law supplants or pre-empts state law, but unless federal jurisdiction is made exclusive both state and federal courts have concurrent jurisdiction of actions arising under the law. Federal instrumentalities may, of course, be given exclusive jurisdiction and in that event only those instrumentalities have jurisdiction of the matter, irrespective of the law to be applied.

1A J. Moore, B. Ringle, J. Wicker & J. Lucas, *Moore's Federal Practice*, ¶0.160, at 189 (2d ed. 1987 & Supp. 1987-88). Notwithstanding statements to the contrary in Section I.C. of the Petition, West Penn Power Company appears to be arguing for both pre-emption and exclusivity in Sections I.A. and B. of its Petition. Clearly, Congress could not mandate that otherwise valid state law causes of action be brought in federal court in the absence of pre-emption. Defendant cites no authority which holds that the Federal Power Act pre-empts state law tort actions for property damage.

**II. THE PLAIN LANGUAGE OF SECTION 825p OF THE FEDERAL POWER ACT SIMPLY PROVIDES FOR EXCLUSIVE JURISDICTION IN FEDERAL COURTS FOR ACTIONS BROUGHT UNDER THE FEDERAL POWER ACT**

Section 825p of the Federal Power Act provides that:

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of *violations of this chapter or the rules, regulations and orders thereunder*, and of all suits in equity and actions at law brought to enforce *any liability or duty* created by, or to enjoin any violation of, *this chapter or any rule, regulation, or order thereunder*.

16 U.S.C. §825p (1982) (emphasis added).

Section 825p does not state that the federal courts shall have exclusive jurisdiction of all actions brought against any federally licensed hydroelectric power dam. Section 825p is directed to actions brought to redress *violations of Chapter 12* of the Federal Power Act, the rules, regulations or orders of the Federal Energy Regulatory Commission ("FERC"), and all actions to enforce or enjoin liabilities or duties created by *Chapter 12 of the Federal Power Act*.

Plaintiffs did not bring this action under the Federal Power Act. There are no federal claims pleaded in Plaintiffs' Complaint. Plaintiffs have brought only common law state law claims in the courts of the Commonwealth of Pennsylvania. Section 825p of the Federal Power Act thus has no application to this lawsuit.

### A. The Areas Of Federal Power Act Pre-Emption Have Been Clearly Established

The areas in which the Federal Power Act pre-empts state law are twofold. First, states may not, directly or indirectly, interfere with the authority of the Federal Energy Regulatory Commission ("FERC") in setting wholesale rates and in regulating agreements that affect wholesale rates of electricity. *Mississippi Power & Light Company v. Mississippi*, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 2428, 2349 (1988); *Nahantala Power & Light Company v. Thornburg*, 476 U.S. 953, 963 (1986). This area of federal pre-emption has been exhaustively treated by the courts and has no application to this action.

In addition to pre-empting a state's ability to regulate or affect wholesale rates for electricity, the Federal Power Act has been interpreted to pre-empt state laws that require a state license as a predicate for building a hydroelectric power dam, because states could, in effect, thus exercise veto power over hydroelectric development by refusing to grant a license. *See First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 177 (1946); *Oregon v. Idaho Power Co.*, 211 Or. 906, 312 P.2d 583, 586 (1957); *City of Tacoma v. Taxpayers of Tacoma*, 43 Wash. 2d 468, 262 P.2d 214 (1953).

In contrast, state law regarding proprietary rights in water is expressly saved. *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239, 252 (1954); *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 379 (1930).

Contrary to Defendant's assertions, the United States Supreme Court has recognized the system of "dual authority" embodied in the Federal Water Power Act. *First Iowa*,

328 U.S. at 167-68. The Supreme Court elucidated this "dual authority" created by the Act as separating the issues of hydropower development into separate jurisdictions, state and federal. *Id.* The Court adhered to this interpretation in *California v. United States*, 438 U.S. 645 (1978), noting that the Reclamation Act of 1902,<sup>3</sup> like the Federal Water Power Act of 1920, was enacted with the specific understanding that states had exclusive control of water within their streams, subject only to federally reserved rights and the navigation servitude. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 *Harvard Environmental Law Review* 135, 168 (1986) (hereinafter "Whittaker").

#### **B. The Legislative History Of The Federal Power Act Does Not Support A Finding of Pre-Emption**

The extent of FERC jurisdiction and the reach of the Federal Power Act cannot be understood without a thorough consideration of the history of the historical alignment between state and federal authority over water use, both prior and subsequent to its enactment. *See* Whittaker, at 136-54.<sup>4</sup> Significantly, lengthy debate occurred, prior to passage of the 1920 Federal Water Power Act, 16 U.S.C. §803 (1982 & Supp. 1986). This legislation preserved states' rights while promoting the federal goal of hydroelectric development. *Id.* at 153.

The explicit language of the Federal Power Act provides that licensees, rather than the federal government,

<sup>3</sup>Stat. 388, 390 (codified as amended at 43 U.S.C. §383 (1982)).

<sup>4</sup>A thorough history of the federal legislation is set forth in the Whittaker article.

are liable for damages. Section 10(c), 16 U.S.C. §803(c)(1982 & Supp. 1986) provides, in part:

Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. 803(c)(1982 & Supp.1986).

Defendant repeatedly refers to 16 U.S.C. §803(c) and 825p, emphasizing the allegedly "comprehensive federal scheme" of the Federal Power Act. Defendant fails, however, to specify *in what area* the Act is alleged to be comprehensive, thus "occupying the field."

In *New York Department of Social Services v. Dubino*, 413 U.S. 405 (1973), this Court rejected a pre-emption challenge which was similar to Defendant's argument in this case. The Court squarely rejected:

the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. Given the complexity of the matter addressed by Congress in WIN (the Federal Work Incentive Program), a detailed statutory scheme was both likely and appropriate completely apart from any questions of pre-emptive intent.

*Id.* at 415.

In recent years, the Supreme Court has been reluctant to find pre-emption solely from a perceived need for uniform national rules. Whittaker at 171 (citing *Goldstein v. California*, 412 U.S. 546, 558 (1973) (drastically curtailing blanket federal pre-emption of copyright and patent laws)

(other citations omitted)). The exercise of state police powers against challenges of federal pre-emption has been increasingly upheld. See, e.g. *International Paper Co. v. Oullette*, 479 U.S. 481, 499 (1987) (Clean Water Act does not bar common law nuisance suit filed in state of source of pollution); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 256 (1984) (Atomic Energy Act does not pre-empt the recovery of punitive damages by a person injured through exposure to radioactive materials); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336 (1973) (Water Quality Improvement Act does not pre-empt common law claims for damages for oil spillage); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 445 (1960) (absent clear manifestation of Congressional intent to pre-empt state common law remedies, the presumption of continuing state authority cannot be rebutted, and the states, through their judicial systems, will be free to provide compensatory remedies.)

As this Court stated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947):

We start with the assumption that the historic police powers of the States were not to be superseded by a Federal Act unless that was the clear and manifest purpose of the Congress.

*Id.* at 230.

The Federal Power Act contains no such clear and manifest purpose and the legislative history fails to suggest any such purpose. Consequently, unless the exercise of police powers would conflict with the federal scheme of the Federal Power Act, those police powers are not superseded.

Pennsylvania does not seek to regulate or supervise the operation of hydroelectric dams. Rather, the state seeks to provide a remedy for its citizens whose property is damaged through acts of negligence of the private owner operator(s). This in no way conflicts with the federal scheme of promoting development of hydroelectric power. *Cf. First Iowa*, 328 U.S. 152, 179 (1945)(pre-empting state regulations which attempted directly to regulate design and operation aspects of federally licensed dam).

**III. THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA IS CONSISTENT WITH THIS COURT'S DECISION IN *PAN AMERICAN PETROLEUM CORP. v. SUPERIOR COURT OF DELAWARE* IN HOLDING THAT THE "EXCLUSIVE JURISDICTION" PROVISION OF SECTION 825p DOES NOT FORECLOSE STATE COURTS FROM HEARING STATE LAW TORT ACTIONS AGAINST LICENSEES**

The Superior Court of Pennsylvania relied on the decision of this Court in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961) in correctly rejecting Defendant's "exclusivity" argument.

As stated above, the Federal Power Act does not pre-empt state law tort actions. Defendant appears to contend, however, in what may only be a semantic difference in Defendant's argument, that even though state law is not pre-empted, the "exclusive jurisdiction" language divests state courts of subject matter jurisdiction to hear state law actions brought against licensees. *See*, Petition, Section I.C. at 15-17.

In *Pan American*, the United States Supreme Court considered the question of whether Delaware courts had

jurisdiction to hear a common law breach of contract action between two corporations subject to regulation under the Natural Gas Act, 15 U.S.C. §717, *et seq.* (1982). The Petitioners in *Pan American* argued, as does Defendant in this case, that the Natural Gas Act deprived the state courts of subject matter jurisdiction over the state law claims.

In *Pan American*, the parties had entered into contracts for the purchase of natural gas. *Id.* at 558. Subsequently, a decision of the Corporation Commission of the State of Kansas fixed a minimum price which had the effect of requiring Cities Service (the plaintiff) to pay a higher rate than specified in the contract. Cities Service petitioned for judicial review of that order and, in the interim, attached with each check a notation that payment was tendered subject to the terms of the original contract between the parties. *Id.* at 658-59.

When the United States Supreme Court reversed the order of the Kansas Corporation Commission's minimum rate order, Cities Service sued in Delaware State Court to recover the overcharges paid under the terms of the Kansas order. *Id.* at 661. The defendants filed petitions for writs of prohibition, attacking the jurisdiction of the Delaware courts to hear the action. The Supreme Court of Delaware sustained the jurisdiction of the Delaware courts. *Id.*

On appeal to the United States Supreme Court, defendants argued that, under the Natural Gas Act, prices paid for natural gas sold wholesale in interstate commerce were required to be in accordance with rates filed with the Federal Power Commission, and that since the actions filed by Cities Service involved filed rates, defendants

argued the actions must either be to enforce or challenge such rates. *Id.* at 662.

Defendants, arguing that the state courts were without jurisdiction, relied on the language of Section 22 of the Natural Gas Act, 15 U.S.C. §717r (1982), which is identical to the language of §825p of the Federal Power Act. Section 717r provides that:

The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.

15 U.S.C. § 717r (1982).

The Supreme Court held that the rights asserted by Cities Service were traditional common law claims which "[did] not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Pan American*, 366 U.S. at 663. Addressing the argument for "exclusivity" under §22 (15 U.S.C. §717r (1982)) of the Act, the Court stated:

Nor does §22 of the Natural Gas Act help petitioners. "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, *not the generator of jurisdiction because of which state courts are excluded.*

*Id.* at 664 (emphasis supplied). The Court clearly found that claims brought under state law were distinct from

claims brought under the Act, and that such claims were actionable in a state forum.

Similarly, in *Airco Alloys Division, Airco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D.2d 378, 411 N.Y.S.2d 460 (1978), plaintiffs, purchasers of electric power from defendant Niagara Mohawk, brought an action in state court seeking a mandatory injunction and money damages arising from Niagara Mohawk's alleged breach of contract. 411 N.Y.S.2d at 462. The defendants moved to dismiss, arguing that the state courts lacked jurisdiction pursuant to §825p of the Federal Power Act, granting "exclusive jurisdiction" to federal district courts. *Id.* at 463. Plaintiffs, as in the present case, responded that the suit was not for violation of any federal law, rule, regulation or order, and was not brought to enforce any liability or to enjoin any violation of federal law. Plaintiffs, instead, argued that the subject matter of the claim was for non-performance of a contract under New York law. *Id.* The court held that *even though the order licensing construction and operation of the facility was an order issued under the Federal Power Act, and exclusive jurisdiction over suits to enforce the liabilities or duties created by the order would be exclusively in the district courts, that order was not the source of the rights asserted by plaintiffs.* *Id.* The court held that if the Complaint asserted traditional contract rights and sought ordinary contract relief, jurisdiction would properly be found in the New York courts, regardless of the exclusive jurisdiction provision in the Federal Power Act. *Id.* at 464. Accord, *Cleveland Electric Illuminating Co. v. City of Cleveland*, 50 Ohio App. 2d 275, 363 N.E.2d 759, 767 (1976)(claim for monies due; Federal Power Act does not bar a plaintiff from pursuing at his option remedies based solely on state law in state forums), *cert. denied*, 434 U.S.

856 (1977); *Delaware County Electric Cooperative, Inc. v. Power Authority of the State of New York*, 96 A.D.2d 154, 468 N.Y.S.2d 233, 236 (1983) (action to void letter agreement; exclusive jurisdiction provision of Federal Power Act does not divest New York courts of concurrent subject matter jurisdiction where complaint asserts rights and seeks relief based upon state law).

**IV. THE CASE OF *SCHNEIDEWIND v. ANR PIPE-LINE COMPANY* IS NOT CONTROLLING IN THIS MATTER, NOR DOES IT PROVIDE A BASIS FOR HOLDING THAT THE FEDERAL POWER ACT PRE-EMPTS STATE TORT LAW**

Defendant's contention that the case of *Schneidewind v. ANR Pipeline Company*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 1145 (1988), is dispositive or that it provides a basis for ruling that the Federal Power Act provides exclusive jurisdiction to federal courts for cases involving state tort claims against operators of federally licensed hydroelectric dams is misplaced. Petition, at 22. In *Schneidewind*, this Court ruled that under the Natural Gas Act of 1938, 15 U.S.C. §717, *et seq.* (1982), a Michigan statute requiring a natural gas public utility in Michigan to obtain state approval before issuing long-term securities was pre-empted by the Natural Gas Act on the basis that the Michigan statute conflicted with the rate-regulation power of FERC under the Natural Gas Act. *Id.* at 1151. This case has little relevance to the issue now before this Court; namely, whether a state court has subject matter jurisdiction to apply its tort laws and rules of liability when an operator of a federally licensed hydroelectric dam commits negligent acts that harm the state's residents.

One of the purposes of Congress in enacting the Natural Gas Act was to create a comprehensive scheme of federal regulation of the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84 (1963). Under the Natural Gas Act, FERC may exercise authority over the rates charged and facilities used by natural gas companies in this transportation and sale. This Court held in *Schneidewind* that the Michigan statute was a direct challenge to and in conflict with the Natural Gas Act and FERC's ability to regulate rates in these matters. *Schneidewind*, 108 S. Ct. at 1151.

Unlike the case at issue, the *Schneidewind* case involved an attempt by a state to regulate the natural gas industry in an area that was clearly pre-empted by federal law. The decision of the Court in *Schneidewind* affirmed that regulation of rates under the Natural Gas Act is reserved for federal, not state, regulatory agencies. *Id.* at 1155.

#### **V. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS CORRECTLY HELD THAT THE LICENSING AUTHORITY GRANTED TO FERC DOES NOT INCLUDE THE POWER TO DISPLACE STATE TORT LAW**

Although not discussed by Defendant, the Court of Appeals for the District of Columbia Circuit recently upheld the viability of state tort law as a remedy for damages caused by the operation of a federally licensed dam.

In *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988) ("SCPSA"), the Court specifically held that the licensing authority granted to FERC

under the Federal Power Act does not include the power to displace existing state tort law.

The South Carolina Public Service Authority owned and operated a hydroelectric project on the Santee and Cooper Rivers near Charleston, South Carolina. This hydroelectric project, which included a 4.38 mile dam known as the Santee North Dam, was licensed by FERC under the authority of the Federal Power Act. Although the dam met prevailing engineering standards when it was built in 1942, recent scientific study indicated that it could fail during an earthquake, thereby flooding the downstream area. *Id.* at 789. When the hydroelectric project and dam came up for relicensing, FERC imposed a number of conditions on its continued operation, including an agreement by SCPSA to compensate all those whose property would be damaged as a result of a dam failure that could have been avoided by reconstruction to meet earthquake events. *Id.* at 790. Significantly, FERC attempted to hold SCPSA to a strict liability standard for property damage. FERC's acting chairman dissented from this requirement on the ground that a license condition requiring SCPSA to compensate property owners for damages caused by dam failure would be a usurpation of authority left to the states by Congress, beyond the Commission's authority. *Id.* Upon a denial by FERC for a rehearing, SCPSA filed suit challenging the legal basis for the compensation requirement.

The issue before the Court was: Whether the Commission (FERC) exceeded its authority under the Act when it conditioned the renewal of a license on the licensee's acceptance of strict liability for flood damage. *Id.* at 791. In analyzing the scope of FERC's licensing authority, the Court necessarily addressed the reach of federal power

with respect to areas of common law remedies traditionally held by the states. After analyzing the legislative history of the Federal Power Act, the Court concluded that Congress did not intend or authorize FERC to displace state tort law applicable to its licensees. *Id.* at 793.

The Court thoroughly analyzed the history of the Federal Power Act with a focus on the separation of state and federal power inherent in the Federal Power Act. In so doing, the *SCPSA* Court noted that:

the legislative history of this Act "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States."

*Id.* (quoting *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 171 (1946)); *See First Iowa*, at 174 (quoting remarks of Rep. William L. LaFollette, 56 Cong. Rec. 9810: "We are earnestly trying not to infringe the rights of the States.").

In its review of the legislative history of the Federal Power Act, the Court of Appeals stated that nothing in the Act granted authority to FERC to displace state laws governing tort liability. *SCPSA*, at 793. Moreover, the Court stated:

Assuming, as the legislative history suggests we should, that Congress intended for §10(c) (16 U.S.C. §803(c)) merely to preserve existing state laws governing the damage liability of licensees, it follows that the Commission (FERC) may not encroach upon this state domain by engrafting its own rules of liability. In particular, the Supreme Court has explicitly warned about interpretations of the Act (FPA) that establish

“futile duplication of two authorities over the same subject matter.” *First Iowa*, 328 U.S. at 170, 66 S. Ct. at 194.

*Id.* at 795.

Furthermore, as the Court discussed, Congress indicated no intent to pre-empt or displace state law and expressed no concern that the policies of the Federal Power Act might be frustrated by a state court's actions.

In *SCPSA*, FERC argued that by requiring compensation, it had simply conditioned a license on the adoption of certain safety measures, and that such action was a proper exercise of FERC's statutory authority. *Id.* at 792. The Court rejected this position, stating:

The Commission's interpretation seems even less tenable when one considers that its unique brand of “protection” would oust the states of their traditional authority to determine the rules of liability in tort. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). As the Supreme Court noted in *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 (1941), “in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background.” Deference to these local interests requires that we decline to find in the Act “radiations beyond the obvious meaning or language unless otherwise the purpose of the Act would be defeated.” *Id.*

*Id.* at 792<sup>5</sup> n.3 (citing *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (state's strong interest in avoiding displacement of its laws governing property rights held to apply to determine the appropriate compensation in condemnation actions under the Federal Power Act)).

Plaintiffs do not challenge the authority of FERC under the Federal Power Act to promote the development of hydroelectric power, to regulate wholesale rates in interstate commerce, or to issue licenses to private parties for the purpose of constructing, operating and maintaining dams and other project works. However, there is a clear distinction between the power of FERC to issue licenses and the power of states to provide, in the exercise of their traditional police powers, remedies to citizens for damages for injuries caused by the operation of such dams. *Id.* at 792; *Pike Rapids Power Co. v. Minneapolis, St. P. & S.S.M.R. Co.*, 99 F.2d 902, 911 (8th Cir. 1938); *Beaunit Corp. v. Alabama Power Company*, 370 F. Supp. 1044, 1051 (N.D. Ala. 1973).

Plaintiffs do not dispute the importance of regulatory and licensing policies under the Federal Power Act. Defendant fails to apprehend, however, the fact that the Federal Power Act does not embody a policy of ousting the states' traditional common law powers.

The liability of licensees for damages caused by their projects is a matter left by Congress to state law. As such, Plaintiffs' Complaint does not attack the fabric of a federal

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<sup>5</sup>In concluding that the Commission did not have the power to specify a *federal* rule of liability, and that *state law* would govern damage claims against licensees, the Court of Appeals did not address the question of whether Plaintiffs could pursue their state law tort claims in state courts.

regulatory scheme as claimed by West Penn Power Company, but rather seeks redress for damages through the application of state law as Congress had intended.

## CONCLUSION

For the foregoing reasons, Plaintiffs-Respondents request that the Petition for a Writ of Certiorari to the Superior Court of Pennsylvania be denied.

Respectfully submitted,

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